No. 76-1052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, METROPOLITAN LIFE INSURANCE COMPANY AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN WASHINGTON, D.C. CHAPTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Several points in the "Brief for Respondent National Organization for Women, Washington, D.C. Chapter, in Opposition" ("NOW Brief") and the "Brief for the Federal Respondents in Opposition" ("Federal Brief"), filed March 30 and 31, 1977, respectively, warrant a response, particularly in light of the subsequent decision by the United States Court of Appeals for the District of Columbia Circuit in

Sears Roebuck & Co. v. *GSA,* —— F.2d —— D.C. Cir. No. 75-2127 (decided April 1, 1977) ("*Sears II*").

1. The Section 709(e) Issue

It is conceded that the EEO-1 reports were obtained by the Joint Reporting Committee on behalf of the EEOC and the Executive Order 11246 compliance agencies. See Petition, pp. 9-10; Federal Brief, pp. 6-7, n.8. This Joint Reporting Committee, however, is nothing more than the alter ego of the EEOC. Petition, p. 10 & n.6. Should circumvention of the Congressional intent expressed in Section 709(e) through the use of a bureaucratic shell be sanctioned? The respondents have not provided a justification for an affirmative answer.

NOW, the private respondent, argues that it would be futile to hold Section 709(e) applicable to disclosure of EEO-1 reports by compliance agencies because those agencies could simply require the filing of the same information on yet another government form carrying a different name or number, which could then be released despite Section 709(e). NOW Brief, p. 15. This begs the issue. If this Court concludes, as we believe it should, that Section 709(e) bars disclosure of EEO-1 reports by compliance agencies, any such transparent attempts to frustrate the import of that holding could be dealt with at the appropriate time. For present purposes, the critical question is whether the compliance agencies should be permitted to render futile a Congressional statute requiring confidentiality for certain information.

2. The Section 1905 Issue

Both respondents concede—and the courts involved categorically acknowledge—that there is a conflict between the Courts of Appeals for the District of Columbia and the Fourth Circuits over the question whether 18 U.S.C. § 1905 is incorporated within the (b)(3) exemption. NOW Brief, pp. 17-18; Federal Brief, p. 8-9.[1] But the respondents argue that the issue over which the conflict exists is immaterial; their theory is that the (b)(4) exemption of the FOIA is co-extensive with Section 1905. *See, e.g.,* NOW Brief, p. 18, citing *Charles River Park "A," Inc.* v. *HUD,* 519 F.2d 935 (D.C. 1975). This theory has now been rejected by the D.C. Circuit in *Sears II*:

> "[I]t does seem clear, as the Government appellees here agree, that § 1905 must be 'considered independent of the FOIA' exemptions. That is, contrary to what we thought in *Charles River Park,* the congruence of § 1905 with exemption 4 is immaterial; the threshold issue now is whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak. . . ." Slip. Op., p. 13 (footnotes omitted).

NOW also argues that the Section 1905 issue has been "resolved" by the recent Congressional amendment of the (b)(3) exemption, while the Federal respondents suggest that the Fourth Circuit must "reconsider" its position on that issue in light of that

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[1] *Compare* Sears Roebuck & Co. v. GSA, 509 F.2d 527 (D.C. Cir. 1974) ("*Sears I*"); National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) *with* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *pet. for cert. pending,* Brown v. Westinghouse Electric Corp., October Term, 1976, No. 76-1192.

amendment. NOW Brief, pp. 18-20; Federal Brief, pp. 7-8.[2] Yet now the D.C. Circuit Court of Appeals—whose position on the Section 1905 issue the respondents are attempting to defend—in *Sears II* has indicated considerable skepticism not about the Fourth Circuit position but rather about its own previously expressed views. The Court of Appeals properly recognized that while the precise result in *FAA Administrator* v. *Robinson*, 422 U.S. 255 (1975), was overturned by the amendment to the (b)(3) exemption, the rationale of *Robertson* clearly indicates that 18 U.S.C. § 1905 is incorporated by the (b)(3) exemption, just as the Fourth Circuit concluded in *Westinghouse*.

[2] In support of its position, NOW relies on a Committee Report discussing proposed legislation that did not pass. The private respondent quotes with supplied emphasis the Report of the House Committee on Government Operations on the Sunshine Act. H. Rep. No. 94-880, 94th Cong., 2d Sess., Part I, 23 (1976); *see* NOW Brief, p. 19 n.17. However, as indicated in the Petition, the Committee version of the (b)(3) amendment that the Government Operations' Report was referring to *was not adopted*. The bill went from the Government Operations Committee to the House Judiciary Committee, which changed the proposed (b)(3) revision because of its unduly restrictive scope. H. Rep. No. 94-880, 94th Cong., 2d Sess. Part II, 7 (1976). Moreover, on the House floor, a substitute revision was introduced which, with one clarifying addition in conference, was the version of the amendment that was finally enacted into law. 122 Cong. Rec. H7897 (daily ed. July 28, 1976). There is nothing in the relevant legislative history such as the authoritative Conference Report which suggests an intent to adopt the House Government Operations Committee's position. Instead, the remarks of the sponsor of the House floor amendment, Congressman McCloskey, indicate that the intent was to *include* within the exemption generally worded, nondiscretionary confidentiality statutes, which he believed were excluded from the Government Operations Committee's proposal. 122 Cong. Rec. E41897-98 (daily ed. July 29, 1976); *see* 122 Cong. Rec. H7897-98 (daily ed. July 28, 1976), E4148 (daily ed. July 28, 1976). 18 U.S.C. § 1905 is clearly such a statute.

Moreover, it found nothing in the recent amendment to strengthen its prior view that *Westinghouse* was in error. But instead of "reconsidering" its position, the D.C. Circuit in *Sears II* in effect asked this Court to speak to the issue.

> "We recognize that this court's decisions in *National Parks II* and *Charles River Park* conflict with that of the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger*. The Solicitor General has sought certiorari in *Westinghouse*. Raising similar issues, several insurance companies have filed a petition for writ of certiorari to this court to review before judgment the companies' appeals from a decision of the United States District Court for the District of Columbia in [the instant case] . . . .
>
> "Any reconsideration by us of the issue as to what extent 18 U.S.C. § 1905 falls within exemption 3 of the FOIA and thus forbids the disclosure of the records here (assuming that they fall within the description of § 1905) would necessarily be a reconsideration of the view of a panel of this court in *National Parks II, supra,* expressed most recently in light of both actions by the Supreme Court and Congress. While the court in *National Parks II* specifically labeled its views on § 1905 and exemption 3 as dicta, and theoretically we would be free to reconsider the issue, *if* we deemed it essential to the disposition of this case, yet given the presently pending matters in the Supreme Court, we think it inadvisable to express an additional view on the same issue.
>
> "Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court on the afore-

mentioned pending matters. Irrespective of the outcome in the Supreme Court, in reviewing the particular issue the District Judge will doubtless bear in mind, as regards his freedom of action under our own decisions, that this court's views in *National Parks II, supra,* were classed as dicta, and that our views in *Charles River Park, supra,* were expressed before the Supreme Court decision in *Robertson, supra,* or the ensuing Congressional amendatory action." Slip. Op., pp. 11-13 (footnotes omitted).

Thus, just as the District Court in the instant case saw "substantial issues" warranting appellate review, including review by this Court (Petition, p. 45a), so too the panel of the D.C. Circuit that decided *Sears II* appears to be welcoming if not actually soliciting review of the instant case by this Court.

3. The Appropriateness of Issuing A Writ of Certiorari Before Judgment

NOW, the private respondent, urges that issuance of a writ of certiorari before judgment so that this case could be taken up with *Westinghouse* would be in appropriate because *to date* the petition in *Westinghouse* has not yet been granted. NOW Brief, p. 9. This point has no substance. As the oppositions to the petition in *Westinghouse* are presently due on April 27, 1977, the question of issuing a writ in that case will be ripe for decision in the very near future. NOW offers no reason for rushing to a denial of certiorari in this case before the issue is joined in *Westinghouse.* The two petitions can and should be considered together.

Both respondents urge that, even if certiorari is granted in *Westinghouse,* it should be denied here

because the issues in the two cases are said to be different or not fairly encompassed within each other. NOW Brief, pp. 10-11; Federal Brief, pp. 10-12.[3] To be sure, the issues posed by the Government in *Westinghouse* are in the nature of procedural or jurisdictional questions while those raised by the petitioners in the instant case go to the merits. Nevertheless, the issues are closely interrelated, as one would expect in two "reverse-FOIA" suits involving precisely the same type of documents. The same issues as the Government is now pressing in *Westinghouse* were raised below by both the private and Federal respondents in the instant case, and are still being pursued at this time.[4] If we are successful on the merits, the procedural barriers which the Government seeks to erect in *Westinghouse* should not suffice to deny relief to the private parties. For example, the agency housekeeping regulations relied upon by the Government in *Westinghouse* cannot abrogate criminal statutes such as 18 U.S.C. § 1905. Further, even on limited abuse-of-discretion review one could establish a right to relief from governmental action contrary to the statutory mandates relied upon here. Even assuming *arguendo* the Government is correct in asserting that the private party in *Westinghouse*

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[3] Apparently a contrary conclusion was reached by the D.C. Circuit in *Sears II* in which the petition in the instant case was described, in relation to the *Westinghouse* case, as "[r]aising similar issues. . . ." Slip Op., p. 12.

[4] For example, in its recently filed opening brief in the Court of Appeals, NOW challenges *de novo* review in the reverse FOIA context, at least beyond the precise facts of *Charles River Park,* in much the same manner as the Government challenges *de novo* review in *Westinghouse.* See Brief for the Appellant/Cross-Appellee, pp. 25-32, National Organization for Women, Washington, D.C. Chapter v. Social Security Administration, D.C. Cir. Nos. 76-2119, *et al.* (March 21, 1977).

could not press the points urged on the merits by the petitioners in this case due to the absence of a cross-petition in *Westinghouse* (Federal Brief, pp. 9-10), it does not follow that the Court should deny the instant petition so as to deprive itself of the opportunity to consider all of the dispositive issues common to these two cases. In any event, the fact that one of two similar cases may pose one or more unique issues does not negate the desirability of taking the two cases together by issuing a writ of certiorari before judgment in one of them. *Cf. Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

Finally, both respondents urge that certiorari before judgment in this case would be inappropriate because petitioners should first attempt to persuade the Court of Appeals that its prior decisions were wrong, or that the District Court should be reversed on other grounds.[5] Federal Brief, pp. 12-13; NOW Brief, p. 7, n.7. The short answer to these contentions is that in *Sears II* the Court of Appeals made it clear that it was reluctant to reconsider its position on the issues posed herein. Indeed it said, evidently hoping that this Court would review the matter, that "we think it inadvisable to express an additional [D.C. Circuit] view on the same issue." Slip. Op., p. 12.

But more fundamentally, there is much more at stake here than the confidentiality of the particular docu-

[5] This latter point is presumably an allusion to the possibility of persuading the Court of Appeals that the District Court's findings of fact on the (b)(4) and (b)(6) exemption issues were clearly erroneous insofar as they are intended to support the denial of a preliminary injunction. Given the refusal of the Court of Appeals to preserve the *status quo* by entering a stay order pending resolution of controlling issues of law, this suggestion must be disregarded as impractical.

ments of the petitioners in the instant case. In seeking certiorari in *Westinghouse* the Government notes that "at least 78 reverse FOIA suits were brought against the government" during 1976, and that there appears to be "a steadily increasing number" of such cases. Petition in No. 76-1192, p. 11 & n.15. The *amicus curiae* in *Westinghouse* has made it clear, not only by his words but also by his action of staying out of the Fourth Circuit litigation while bringing an FOIA suit based on the same facts in the U.S. District Court for the District of Columbia, that there is a considerable amount of forum-shopping in FOIA suits not only by those seeking to protect confidentiality as he charges but also by those seeking to compel disclosure of information. *See* Brief of Reuben B. Robertson, III, *Amicus Curiae* Supporting the Petition in No. 76-1192 (March 18, 1977). Forum shopping is prompted largely if not entirely by the differing interpretations of substantive FOIA law found in the various District Courts and Courts of Appeals. There are, in short, compelling public interest considerations which justify prompt clarification by the Court of the substantive issues through issuance of a writ of certiorari at this time—public interest considerations which the respondents simply have not addressed.

Respectfully submitted,

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